82-1280

COPY

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

SPAWR OPTICAL RESEARCH, INC.,

WALTER J. SPAWR and FRANCES A. SPAWR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's determination that petitioners' convictions on counts three through six and ten through fourteen were not based upon unconstitutional executive and regulatory authority.

II. Whether the Court of Appeals erred in failing to review petitioners' jurisdictional challenge to the regulations under which they were prosecuted.

III. Whether the Court of Appeals erred in concluding that the petitioners were not denied a fair trial through prosecutional misconduct.

IV. Whether the Court of Appeals erred in affirming the trial court's admission of statements of co-conspirators.

V. Whether the Court of Appeals erred in affirming the trial court's judgment that there was sufficient evidence to convict petitioners.

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Petitioners, SPAWR OPTICAL RESEARCH, INC., WALTER J. SPAWR and FRANCES A. SPAWR, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 24, 1982 and modified on November 10, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is published in United States v. Spawr Optical Research, Inc. et al., (1982) 685 F. 2d 1076, and is attached hereto as Appendix A (A-1). Said opinion affirmed the judgment of conviction of Petitioners by the United States District Court for the Central District of California entered on January 19, 1981. A Petition for Rehearing En Banc was denied on November 10, 1982 and the opinion modified in part. A copy of said order is attached hereto as Appendix B(B-1).

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court is invoked under the United States Constitution Article III §1 clauses 2 and 3, Article III §2 cl. 2 and 28 U.S.C. §§1254(1).

PROCEEDINGS BELOW

On September 3, 1980, the Grand Jury for the United States District Court for the Central District of California returned a fifteen count Indictment against the defendants, Walter J. Spawr, Frances A. Spawr, and Spawr Optical Research, Inc., (hereinafter "the corporation").[1]

Counts One through Six of the Indictment charged violations of 18 U.S.C. §1001 based upon alleged false statements by the defendants concerning the value of certain

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1) The indictment followed an intermittent investigation in excess of two years, during which the government seized numerous documents and records belonging to the defendant corporation. The corporation's pretrial motions to dismiss the Indictment based on pre-indictment delay and the prejudice resulting from the government's apparent failure to return all of said records, as well as the government's failure to allege separate acts of the corporation sufficient to support the allegations of the Indictment, were denied by the District Court. The corporation's motion for severance was similarly denied despite the fact that the government intended to introduce statements of the individual co-defendants against the corporation. (T. 120).

shipments of laser mirrors entered upon Shipper's Export Declarations (hereinafter "SED's") and submitted to the U.S. Department of Commerce. Counts Seven through Nine charged violations of 50 U.S.C. App. §2405(b), and 15 C.F.R. §§387.6, 372.1(b) and 371.2(c)(5), alleging defendants had exported copper watercooled mirrors to West Germany in July, 1976, with validated export licenses and with the knowledge that said mirrors would be transshipped to and used for the benefit of the Union of Soviet Socialist Republics. Counts Eleven through Fourteen alleged similar violations to those charged in Counts Seven through Nine for alleged shipments to Switzerland occurring in February of 1977. Eleven through Fourteen, however, charged violations under 50 U.S.C.

App. §5(b), Executive Order No. 11940 of September 30,1976, and 15 C.F.R. §§387.1(a) 387.6, 372.1 (b) and 371.2 (c)(5).[2] A conspiracy to export laser mirrors without licenses to Switzerland, knowing they would be transshipped to the U.S.S.R. was alleged in Count Ten. The above-named defendants were named in the conspiracy count together with an unidicted co-conspirator, Wolfgang Weber, a German National who was the President of Oriel Optik. Oriel Optik acted as a European Distributor for Spawr's Products.

The trial commenced on November 10, 1980, and lasted thirteen days over a period of more than thirty days. The government presented 13 witnesses while 12 witnesses were called by the defense.

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2) Count Fifteen was dismissed by the court below because the government admittedly failed to establish exportation to the destination alleged in the Indictment. (T.1984-1985).

During the course of the trial, defendants, asked for a hearing on the government's evidence of a conspiracy independent of conspirators' statements, including corporate documents. The hearing was denied based on the government's offer of proof, which offer defendants maintained was wholly insufficient.[3] (T. 473-482).

Defendants' motions for a judgment of acquittal at the close of the government's case-in-chief[4] and at the close of all

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3) References to the trial transcript are cited as "(T.)." Reference to the Clerk's Record are cited as "(C.R.)."

4) In support of their motion, and with respect to Counts Seven through Fifteen, defendants argued that the government had failed to produce sufficient evidence on the necessary element of "Knowledge that these mirrors whould be transshipped to and used for the benefit of the Communist-dominated country" (emphasis added), since there was absolutely no evidence of use. (T.1183-1184). As to Counts One through Six, defendants noted that there was a lack of any evidence of the "cost if not sold," which was the one aspect of the amount the government claimed was falsified on the Shipper's Export Declarations. (T.1184-1186). Subsequently, the court below indicated, and the government agreed, that the issues of value and cost were questions of law (T.1444) but the court failed either to rule on whether the government had established that the

the evidence were denied. (T.1184, 2049-2050).[5] A motion to dismiss based on the interference by a Department of Defense Attorney with the sole expert witness for the defense was also denied. (T.1980-1983).

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values listed on the SED's were false or instruct the jury as to a definition of cost. (T.2283-2287).

[5]The defendants contended, in part, that the regulations upon which Counts Seven through Nine were based are unconstitutionally vague and that the President was without constitutional authority to issue Executive Order 11940, the basis for Counts Eleven through Fourteen. (T.1986-1990; 2039-2049). In denying defendants' motion pursuant to Rule 29(b) of the Federal Rules of Criminal Procedure, the District Court noted that the statutory scheme under which Counts Eleven through Fourteen were charged "is certainly less than regular" and further expressed concern as to the viability of same of the regulations charged in the conspiracy count (Count Ten). (T. 250).

Defendants' Proposed Instruction which designated "used for the benefit of a Communist-dominated country" as an element of the offense to be proved beyond a reasonable doubt and which defined the terms "used" and "benefit," was rejected by the trial court (T. 2055) despite the fact that the government had previously indicated that it had the burden of establishing "a benefit." (T. 92). Rather, the court merely instructed that, as a matter of law, the false statement alleged was material. (T. 2311).

The government initially indicated that it was going to request the court below to charge a lesser included offense, i.e., 50 U.S.C. App. 2405(a), which offense does not require knowledge that the controlled item would be subsequently transshipped to a Communist-dominated country. (T. 85). The court ultimately declined to charge on any lesser-included offense.

(T. 2031).

On the day of the commencement of jury deliberations, counsel for the government, Assistant United States Attorney, Theodore Wai Wu, informed the trial court that there was to be a national news broadcast series beginning that same evening on NBC dealing with the "general export of technology and commodities."[6] The government claimed that the Spawr case was not mentioned at all. (T. 2289-2291). The court initially reserved its decision regarding the appropriate action to take, i.e., sequestration or instructions (T. 2290), but at the close of the first day of deliberations, denied defendants' request to sequester the jury

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6) The instant case was the subject of considerable media attention both pretrial and during trial. The trial judge included in his jury voir dire questions concerning awareness of the facts of the case due to media exposure and expressed his intent to exclude any prospective jurors who had heard of the case. (T. 107-110).

and specifically instructed the jurors not to watch a television network program that might mention the case. (T. 2342-2351). That evening, December 8, 1980, an NBC broadcast entitled "Soviet Spies" was telecast in which the Spawrs were shown and in which Mr. Wu was interviewed regarding export of technology cases. (T. 2361-2364). This interview took place after the Spawrs had been Indicted.

On the fifth day of the deliberations, the jury returned the last of its verdicts on those counts on which they were not hopelessly deadlocked: Walter Spawr was found guilty of Counts Ten through Fourteen; Frances Spawr was found not guilty of Counts Seven through Nine and guilty of Counts One through Six and Ten through Fourteen; and the corporation was convicted on all counts. Counts One through Nine were dismissed as to Walter Spawr,

the District Court having declared a mistrial as to said counts. (T. 2440-2452, 2509).[7]

Defendants' post-trial motions for a judgment of acquittal, to arrest judgment and for a new trial were all denied by the District Court. (T. 2461-2462).[8] The corporation was fined a cumulative amount of $100,000.00 (One Hundred Thousand Dollars) and placed on probation for five years. (T. 2501-2502, 2504, 2506-2507). Walter Spawr was sentenced to a period of

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7) During colloquy as deliberations continued, the court below noted several times that it was concerned about the problem of inconsistent verdicts arising if the corporation was convicted on counts on which the individual defendants were not convicted. (T. 2394, 2407, 2418). Although this problem became a reality, the court let the verdicts stand.

8) In addition to the issues raised in defendants' prior Rule 29 motions and motion to dismiss, defendants' contended that the government was guilty of misconduct. (C.R. 51).

five years on Count Ten, ordered to serve six months with the remaining term of imprisonment suspended, and placed on probation for a period of five years. On each of Counts Eleven through Fourteen, he received concurrent sentences of ten years, ordered to serve six months and placed on probation for five years thereafter. The total period of incarceration was six months, and as a condition of probation, he was ordered to perform five hundred hours of community service (T. 2505-2506). Frances Spawr was sentenced to concurrent suspended sentences of five years on each count, placed on probation for five years and ordered to perform five hundred hours of voluntary services to charitable institutions. (T. 2503-2504). A Notice of Appeal was timely filed, and the execution of the sentences has been stayed pending appeal. (T. 2507).

Petitioner's judgment of conviction was affirmed by the Ninth Circuit Court of Appeals on August 24, 1982. Thereafter, a Petition for Rehearing En Banc was denied on November 10, 1982 and the original Opinion of the Court of Appeals was modified.

STATEMENT OF THE CASE

The United States Department of Commerce paved the road to Moscow and gave directions. (T. 329-330).

A. The Transactions

Spawr Optical Research, Inc., was founded in 1969 in the garage of Walter and Frances Spawr as an off-hours venture while the two were employed full-time by the Rockwell International Corporation ("Rockwell"). (T.1624-1625).

Spawr perfected a unique metal polishin process while employed at Rockwell. This process was used in the development of "rear-view" mirrors for Apollo spacecraft astronauts and other projects requiring

unique optical components. (T.1630). Spawr offered to give Rockwell a garage-formulated polishing process which would reduce polishing times from two weeks to eight hours, but this offer was refused. He left that company shortly thereafter and founded Spawr Optical ("The Corporation"). (T.1630-1631).

Walter Spawr functioned as the President and Chief Executive Officer of the corporation. He could often be found in the shop polishing mirrors or designing new products. (T.302, 306, 311). His wife, Frances Spawr, was Corporate Secretary and handled the corporation's administrative affairs. (T. 303, 305, 311, 1426). The corporation remains family-owned and controlled. (T.303). The corporation soon became involved in the specialized area of laser optics, in particular, the polishing of laser mirrors.[9]

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[9] Laser is an acronym for Light Amplification by Stimulated Emission of Radiation. A laser consists of two mirrors in a tube, placed in opposition. The tube contains a gas, such as CO_2, argon, krypton or

In 1974, the corporation began to explore the possibility of entering international markets. (T.312). To facilitate that entrance, Walter Becker, the General Manager, attended a Department of Commerce seminar concerning export requirements. (T.313, 1638). He was somewhat confused by the export regulations in general and their applicability to the corporations' products in particular. (T.317, 388, 1638-1639). He told Walter Spawr that he believed the export regulations contained an exception for institutes of higher education. (T.386, 381-392).

Becker recontacted the Department of Commerce in an effort to determine the

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or helium-neon. The gas is in turn excited by electricity and is thus converted into a beam by light. The mirrors serve to focus and direct the beam so that the instrument may "lase." (T.1037-1038). It is sometimes necessary to cool the mirrors due to the intense heat which may be associated with the focused beam. Industrial applications for lasers include welding, heat-treating and cutting (T.1628), and medical research. (T.1026). There are some potential, contemplated or embryonic military applications for lasers. (T.1012).

necessity for licensing his product. He was told to submit his applications and that Commerce would act appropriately. (T. 392).

In the early 1970's, the corporation entered into a distribution and sales representation agreement with Oriel Optik GmbH, a German firm in turn represented by Wolfgang Weber, a West German National. Mr. Weber testified at trial as an immunized co-conspirator. (T.796-863, 757-758, 842-843). Weber testified that his principal business involved the importation and distribution of scientific equipment, particularly optics. His business territory covers West Germany, Switzerland, Italy, Australia and the COMECOM countries. (T.756-757).[10] He testified that he first contacted Walter Spawr "in the early seventies" in an attempt to obtain a sales and distribution agreement from the corporation. (T.759). That agreement called

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10) COMECOM is a Russian acronym for Council for Economic Mutual Assistance, the Eastbloc equivalent to the European Economic Community. (T.797).

for Oriel to represent the corporation in the territories previously mentioned. The corporation was to sell mirrors to Oriel Optik, GmbH, at a discount price. Oriel then resold the mirrors. The corporation would forward the occasional European inquiries it received to Oriel for sales follow-up. (T327-328,760). The agreement also precluded the corporation from requiring Oriel to disclose the identity of their customers. Weber insisted on this condition to protect his company's sales territory and promotional efforts. (T.1642-1643, 1656-1657).

In fiscal 1975, the corporation's Oriel transactions comprised 10% of output; in 1976, such transactions accounted for 9% of total output. (T.1429).

In 1975, the corporation recieved a circular from the Department of Commerce inviting their participation in a trade show held in Moscow, U.S.S.R.; "Physics '75"

(T.321, 329). Becker, Richard Pierce, a research scientist; and Walter Spawr discussed the possibilities of Oriel's exhibiting their products at the trade show. (T.766). Mirror samples were sent to Oriel, (T.1666), who in turn took them to the Moscow trade show in October, 1975. (T.767-768, 800).

The trade show exhibition perked Soviet interest in the corporation's mirrors. Shortly thereafter, Oriel was invited to Moscow for technical discussions with a Soviet import purchasing agency; Maspriborintorg. He attended a meeting in Moscow and was introduced to a professor at Moscow Univeristy, Dr. Pismenny. (T.770-771,805).

After the meeting, Weber telephone Walter Spawr from Moscow requesting price quotations for certain specified mirrors. Weber testified that he told Walter Spawr he was negotiating with the Soviet Union, but did not know if he identified the individuals with whom he was dealing. (T.772, 807).

After receiving the requested price quotations, Oriel entered into a contract to sell forty-five (45) mirrors to Mashpriborintorg. He then placed a corresponding order, in letter form (Govt.'s Ex.10), with the corporation. (T.807-808). That order was for both water-cooled and uncooled copper mirrors. (T.773).

The corporation commenced manufacture of the mirrors. (T.333). Walter Spawr and Becker discussed the need to apply for a license, and Becker subsequently inquired of the Commerce Department whether the product required an export license. (T.322). The Commerce Department refused to inform the corporation of the need for a license application; rather, they required the corporation to submit a license application with appropriate documentation. Becker thus informed Walter Spawr and was instructed to submit a license application. (T.334-335). It was further determined that the corporation could best use a multiple transaction license applic-

able for two years. This required an estimate of the total amount of anticipated sales for the two year duration of the license. After correspondence with Weber, a $250,000.00 amount was established. (T.337-338).

Jackie Lackey Topping,[11] formerly the corporation receptionist-secretary, testified that she recognized a series of invoices indicating that Weber had personally taken delivery of a portion of his Russian order at the Spawr plant. This transaction occurred over the Memorial Day holiday-weekend of 1976. (T.564-565).

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11) Jackie Lackey Topping is now married to Michael Topping who also testified at trial (T.486-531). Mr. Topping was fired by Walter Spawr in January, 1977, for drug-related activity on the job (T.518). At the time of trial, Mr. Topping was employed by Design Optics, Sunnyvale, California, as was another witness and former Spawr Optical employee, Mr. Stan Truitt. Truitt testified that Design Optics is a direct competitor of the Corporation and is presently using a polishing technique similar to the Corporation trade secreted process. (T.450).

Jackie Topping also testified that partial shipments had been made to Oriel in Germany on July 9, 1976, and July 16, 1976, respectively (Gov't Exhibits 2 and 3). She claimed that Frances Spawr had instructed her to type shipping labels stating the value of the mirrors to be $500.00. Sne stated the reason given her for this procedure was to avoid the necessity of an export license. (T. 568). Frances Spawr testified that shipping instructions were given to her by Weber for "insurance purposes" and that manufacturing costs did not exceed $500.00 per mirror. (T. 1449-1451).

Weber stated that he had taken mirrors to Germany or had received them there. (T. 813-814). Yet he was unable to state with any degree of certainty that the purported shipping documents (airway bills) were related to the mirrors in question. (T. 799). Walter Spawr testified that he

believed the mirrors were thus destined for Germany. (T. 1667).

Weber further stated that he was invited to revisit the Soviet Union for additional "technical discussions" (sic) in March or April, 1976. That visit also culminated in a second Russian order. Weber again telephoned Walter Spawr from the Soviet Union and requested a price quotation. Spawr gathered the necessary information and communicated his price quotations to Weber via a telephone call to Moscow. (T. 809). Weber claimed to have informed Spawr of the end uses contemplated by the Soviets.

Weber testified that Walter Spawr considered it necessary to apply for an export license for the second order. Spawr required an end-user statement to complete the required documentation; Weber forwarded such a statement from Mashpriborintorg to the corporation. (T. 811).

The corporation submitted a license application on May 4, 1976. (T. 662). The manufacturing process continued in anticipation that the license would be granted.

John Boidock, Director of the Electronic Equipment Division, the Commerce Division charged with the export licensing of laser optics, testified that processing of the application did not begin until August, 1976. On August 16th, Boidock telephoned Walter Spawr to gain insight and information concerning the technical specifications for the mirrors. He questioned Spawr concerning applications for the mirrors, relevant power levels and damage thresholds. (T. 662-665, 1672). Boidock testified that his knowledge in the particular field was "limited." (T. 665). Walter Spawr sent Boidock certain technical materials gleaned from a Department of Commerce publication entitled "Laser Damage Symposium" to assist Boidock in his

licensing determination. (T. 675-677). Boidock testified that he told Spawr that he would present his " . . . the best way I (sic) know how . . ." (T. 665).

Walter Spawr stated that he applied for an export license because he "never felt right about selling anything to the Soviet Union and . . . that if we were going to do it that everything should be above board and we should go ahead and process all necessary paperwork and see what the Commerce Department said about it." He therefore instructed Walter Becker to apply for a license. (T. 1819).

Spawr also testified to having a conversation with Robert Manila, a Commerce Official, concerning his presentation of damage threshold specifications in certain data sheets used by the company. Manila was apparently concerned because other companies did not list damage threshold specifications when applying for export

licenses. Spawr tendered an experimental data sheet which did not list the damage threshold values to determine the effects on the Company's sales and Commerce treatment of the corporation's applications. (T. 1820-1823).

Weber testified that sometime during the pendency of the license application he informed Walter Spawr of a Department of Commerce ruling which allowed U.S. exporters to ship optics for lasers with an output of 1.2 kilowatts (1200 watts) without a license. He also informed Spawr that "any shipment which was declared to be valued less than five hundred dollars ($500.00) would not require a license." (T. 816).

In October, 1976, the corporation informed Weber, by telegram that their request for a license had been denied. (T. 810). On November 3, 1976, Weber wrote to the corporation and Walter Spawr informing them that he was thereby forced to

cancel his pending order. (T. 821) Weber believed Walter Spawr intended to use the letter to persuade the Department of Commerce to modify its denial. (T. 823).

Weber testified that he had formulated a method to "save the order." (T. 822-823). The method purportedly called for the corporation to ship the order to a Swiss freight forwarder and Weber would thereafter transship the goods to the U.S.S.R. (T. 823-827).

Likewise, Stan Truitt testified that he had first met Wolfgang Weber at a luncheon he attended with Walter Spawr at a restaurant in Corona. Weber was visiting the United States and met with Spawr and Truitt to discuss their general business relationship. Weber mentioned selling mirrors from the trade show directly to the Soviets. Truitt interposed that that plan required an appropriate ruse to avoid licensing difficulties. He suggested

returning copper blanks in place of any mirrors sold. Truitt admitted that Walter Spawr did not participate in that conversation or react to it in any way. (T.435-439, 466).[12] Truitt could not recall the date or month of that meeting, rather only that it was in Winter of 1975. (T.435).

In February, 1977, Weber informed the corporation that he had a new customer for the mirrors covered by the second Russian order.

The new customer was in Switzerland. The corporation removed the mirrors from stock (T.1824) and shipped them to Weber in Switzerland according to his instructions. (T.823-825, 843, 356).[13] Pursuant to those shipments, the corporation, by Frances Spawr, executed shipping documents including Shipper's Export Declarations. Frances

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[12]Weber had no recollection of any such conversation (T.765).

[13]Shipment dates were February 9, 10, 11 and 14, 1977.

and Walter Spawr believed that the shipments were destined to a Swiss customer of Oriel's. (T.1824-1828).

Weber testified that he received the mirrors in Switzerland; removed the corporations labels and replaced them with his own. He then transshipped the mirrors to Moscow. (T.826-827.)

B. Costs

The Shipper's Export Declarations (SED'S) filed by the corporation in conjunction with the shipments referred to in the Indictment, Counts One through Six, required the following information be provided by the shipper:

> "VALUE AT U.S. PORT OF EXPORT (Selling price or cost if not sold, including inland freight, insurance and other charges at U.S. port of export) (Nearest whole dollars; omit cents figures)."

The Export Administration Regulations, 15 C.F.R. §399.1:1552A, exempt controlled commodies valued under $500.00 from validated licensing requirements.

Jackie Topping testified that Frances

Spawr instructed her to type and execute SED's starting the value of shipments to be $500.00 for the purpose of avoiding licensing requirements (T.538) [Counts 1,2,8 and 9].

Dr. Donald Winter was employed by the Defense Advanced Research Projects Agency (DARPA) at the time of trial. He had previously been employed by TRW as a program manager in the laser optics field. He was asked his opinion concerning costs of copper mirrors of the type in issue. He stated that TRW had ceased manufacturing such mirrors in 1974. However, he testified that the values declared by the corporation and the Spawrs were, in his opinion, low. The basis for his opinion was an examination of certain government exhibits, invoices and specification sheets. His responses were to questions of cost (T1071), and prices (T.1076) without distinction as between the two terms. (T.1067-1081).

Berniece Peevey, the corporation's con-

troller, testified that based upon her review of corporate records the costs of manufacture of the mirrors in issue did not exceed $500.00 in any particular instance. These corporate records included time sheets, labor rates, "applied burden" (overhead), costs of materials, costs of subcontracting, general and administrative costs.

Mrs. Peevey testified that she employed the same procedures to determine the costs of manufacture of the corporation's mirrors as she had used in her previous employment with Rockwell International as a "methods analyst," a position she held for eleven years. (T.1239).

C. License Exemption by Specifications

The Export Administration Regulations, 15 C.F.R. 399.1 incorporating by reference Export Commodity Control §§8611(a)(A)(b); 7299(25)(A)(e) provides that CO_2 lasers, components, parts and accessories thereof with the following characteristics are excepted from

validated license requirements:

> "(i) an output wavelength in the range of 9 to 11 microns (ii) a pulsed output not exceeding 2 joules per pulse and an average or continuous wave maximum rated output power not exceeding 1200 watts (emphasis added), and (iii) in which the beam electrical excitation, and gas flow, if any, are in the same direction or these using the TEA (transverse excitation atmospheric) principle for excitation."

Expert testimony established that CO_2 lasers have an output wavelength of 10.6 microns (T.1013, 1735). The use of transverse excitation atmospheric (TEA) principle was not disputed. Rather, testimony focused on item (ii), output power ratings, and their general applicability to laser mirrors, in particular, the revelance of the application of such output criteria to laser mirrors as distinguished from laser systems, or other types of laser components, parts or accessories.

Drs. Raymond Wick, Donald Winter and Petras Avizonis testified on behalf of the government that the specifications of the mirrors in issue indicated that their design

characteristics contemplated implementation in laser systems with a continuous wave (lightbulb-like) output in excess of 1200 watts (1.2 kilowatts). (T.1014, 1029, 1045, 1937). This testimony was seemingly based in large part on damage threshold calculations. Drs. Wick and Avizonis are currently employed at the Air Force Weapons Laboratory-Kirkland Air Force Base.

Robert Rice, a Special Agent for the Department of Commerce, testified that the destruction threshold specification of the mirrors subjected them to the validated license requirement. He so testified before the Grand Jury. (T.969-975).

Dr. Peter Franken, an expert called in behalf of the defense, was the former Director of DARPA, and is currently the Chairman of the University of Arizona's Optical Sciences Center, the leading optical sciences institution in the free world. (T.1694-1696). At the time of trial he was a consultant to the Secretary of Defense.

Franken testified that the relationship between damage threshold and output was such that damage threshold would always exceed output. He further stated that damage threshold specifications were an inadequate basis for determining output (T.1705-1707).

Richard Pierce and Walter Spawr designed the mirrors in issue. They testified that the damage threshold of a laser mirror and the rated output of a laser system were not related concepts (T.1874-1887). Dr. Franken corroborated this testimony by use of an automobile tire analog stating:

> "If I purchased automobile wheels with stated capabilities of going at a hundred fifty miles an hour, that would only tell you that I might take a trip on the expressway at that speed, but I might also go to Phoenix at 55 miles per hour. It only gives me an upper bound on what I can do."
>
> "In the same sense these specifications are placing upper bound on some of the things that could be accomplished with a laser design that is not at all revealed in this purchase order (Gov't Exhibit "10")" (T.1754-1756).

D. Benefits

Dr. Wick claimed the "reverse engineering" was a substantial benefit which might accrue to parties in possession of the corporation's mirrors. He believed that design data concerning the shape and strength of watercooled passages and faceplate brazing techniques might be gained through such inspection. (T.1004, 1010-1011).

Dr. Franken disputed Wick's testimony. He stated that technologically, "nothing of substance" would be gained by the Soviet Union's possession of the mirrors in issue. He further testified the corporation's mirrors were unique by virtue of their finish or polish, a characteristic not subject to reverse engineering. (T.1726-1730).

E. The Investigation

The investigating officers in the case at bar were Special Agent Stephen Dodge of the United States Custom Service (T.864) and Special Agent Robert Rice of the Department

of Commerce (T.917). The investigation seemed to be conducted in two separate time frames.

The agents testified that on March 9, 1978, they interviewed Frances and Walter Spawr at the corporation's offices in Corona, California. The agents first spoke to Mr. Spawr, who denied any wrongdoing. The agents requested corporate documents and testified that Frances Spawr was advised of her Miranda rights. Walter Spawr was not so advised. (T.867-873). However, Mrs. Spawr denied that she was ever advised of her rights (transcript of Motion to Suppress, November 3, 1980, pp. 26-27, 37-39). The agents received a written statement from Mrs. Spawr. (T.882).

After receiving and reviewing the above referenced corporate documents, the agents served a Grand Jury subpoena for corporate documents, returnable March 13, 1978. The Spawrs relinquished the documents to the agents. (T.888). Agent Dodge testified that he did not physically inventory the documents,

neither did he number them or give a particularized receipt to the Spawrs. (T.890).

Subsequent subpoenas were issued on May 2, 1980 and October 22, 1980 (T.918).

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals Opinion Affirming the Validity of the Basis for the Regulations Upon Which Petitioners were Convicted Raises Significant Constitutional Questions

Counts Three through Six and Eleven through Fourteen upon which Petitioners were convicted were based upon regulations existing under the authority, if any, of Executive Order 11940.[14] Petitioners submit that the Court of Appeals erred in holding that this Executive Order was Constitutionally permissible.

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14) The acts were alleged to have occurred during the time period when the EAA of 1969 had lapsed. Moreover, while counts three through six charge violations of 18 U.S.C. §1001, the SED'S, upon which the false statements are alleged to be made, are required to be completed pursuant to a regulation (15 C.F.R. §330.7) which is itself invalid if Executive Order No. 11940 is constitutionally defective. Accordingly, defendants should not be held accountable for any statements contained in SED'S for the period of September 30, 1976, through June 22, 1977. Count Ten charges a conspiracy under 18 U.S.C. §371,

Two questions must be answered with respect to the reaching of a determination as to the facial constitutionality of Executive Order No. 11940:

> (1) Was the order executed pursuant to an actual national emergency and does the Order bear a rational relationship to that emergency, as required under §5(b) of the TWEA; and
>
> (2) If so, did Congress intend to permit the President to employ the same regulatory tool during a national emergency as it had formerly employed under the terminated EAA?

The Court of Appeals declined to consider the first question indicating that it was essentially a political question, 685 F.2d at 1085. The Opinion assumes existence of a national emergency and considers the effect of the regulations only in light of the existence of an actual emergency. However, this issue is critical since if no

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but alleges that the purpose of the conspiracy was to violate those regulations in force by virtue of Executive Order No. 11940. Accordingly, if the Order is invalid, the conspiracy count, too, must fall.

actual emergency existed the regulations were invalid and Petitioners' convictions infirm.

President Ford's declaration of a National Emergency in issuing Executive Order 11940 relied upon Presidential Proclamation 2914 of December 16, 1950, and Presidential Proclamation 4074 of August 15, 1971. It would seem obvious that a matter of such extreme urgency as to be considered a "national emergency" could hardly continue to exist for such lengthy periods of time without bringing the nation to the verge of collapse. Clearly such was not the situation in 1976.

Proclamation 2914 addresses itself to the Korean Conflict and "Communist Aggression." Examining the applicability of this order to a 1969 criminal offense the Court of Appeals in United States v. Bishop (10th Cir. 1977) 555 F.2d 771 stated,

> "The term 'communist agression' is vague. The imperialistic ambitions of the Soviet Union may be recognized. Its ideology conflicts with that of the United States. The position of the United States is such that daily occurrences aroung the globe must be based on conditions beyond the ordinary. Otherwise it has no meaning. The power of the Soviet Union on world affairs does not justify placing the United States in a constant state of national emergency."

Id. at 777 (emphasis added). Consequently the court rejected the 1950 order as a proper basis for a national emergency in 1969. Likewise it would seem clear that the same state of affairs did not exist in 1976. The attempt to utilize this as a basis for Presidential exercise of controls would seem to nullify the meaning of national emergency.

Similarly, President Nixon's 1971 Order was responding to an international economic crisis in 1971. See United States v. Yoshida Intern, Inc. (C.C.P.A. 1975) 526 F.2d 560, 567. The immediacy of that problem, for example, justified the imposition of an

import tariff that did not conflict with any statute. Id., at 577-578, 583. The judicial acceptance of the Presidential action in Yoshida was premised not only by the need for prompt action in the face of a real emergency, Id., at 581, but also because the remedy instituted by the Order was capable of being "quickly imposed and removed, is not discriminatory among [those] affected, and is administratively less complex [than other forms of action]." Id., at 580. None of these considerations justify the wholesale adoption of the complicated machinery and regulatory scheme created by the Department of Commerce pursuant to the express congressional authority granted by EAA through a Presidential declaration of a fictional national emergency under §5(b) of the TWEA. The regulations were capable of being quickly imposed in September of 1976 only because they were already in existence. Their speedy removal in favor of another remedy more

closely related to the "emergency" declared by Order No. 11940, however, would have required the dismantling of an intricate bureaucracy created pursuant to the EAA of 1969. Indeed, it is clearly for this latter reason, and not because of the presence of a national emergency, that the 1976 Presidential proclamation was made.[15] Moreover,

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15) The references to the EAA in Executive Order No. 11940 and the revocation of that Order No. 12002 of July 7, 1977, which was classified as a note to the EAA of 1979 (50 U.S.C. App. §2403, et seq.) and not to §5(b), are further evidence that the continuation of the export regulations from September 30, 1976, through June 22, 1977, was not done pursuant to any legitimate delegation of power under §5(b).

the irrational selectivity of the items regulated under the Commodity Control List (see 15 C.F.R. §399.1),[16] and surviving under Executive Order No. 11940, are discriminatory in their application.

That the Congress did not intend §5(b) to confer upon the President the authority to resurrect "all rules and regulations issued by the Secretary of Commerce under the authority of the Export Administration Act of 1969, as amended" (see Ex. Or. No. 11940, Sec. 2), is implicit in the fact that the legislature let the EAA lapse for a lengthy period of time before it passed the Export Administration Amendments of 1977, P.L. 95-52, 91 Stat. 235, June 22, 1977. Clearly, this was not a case of congressional oversight as the three earlier short-term lapses

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16) The commodity control list contained such items as sun glasses and self-adjusting nose bridges.

might arguably be viewed. See note 20, infra.[17]

The absurdity of a national emergency to be declared based upon a state of affairs existing 5 or 26 years prior to the date of the declaration is particularly clear in light of the automatic termination provisions of the National Emergencies Act, 16U.S.C. §1622(d). Clearly, there Congress expressed an intent that an emergency be a presently existing state since automatic termination was provided after one year if no new Presidential proclamation was issued. Moreover, since this is an area of legislative regulation it is clear that it is not solely a

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17) Both the National Emergencies Act and the 1977 Amendments to the TWEA are further evidence of Congressional intent to restrict the powers of the President through executive declarations of National Emergencies.

political question untouchable by the courts. The Court of Appeals' failure to review the propriety of this national emergency unquestionably precludes effective appellate review of Petitioners convictions.

The constitutional defectiveness of the 1976 Presidential Order exists for reasons beyond these pointed out above when applied to the case at bar. The instant case is unique among the spectrum of cases reviewed by the courts previously considered in the exercise of Presidential power pursuant to congressional delegation of authority. This case is the only criminal prosecution that Petitioners have been able to uncover based on a §5(b) Presidential proclamation directed at controlling non-military related exportation. Indeed, the fact that the instant case involves the rights of individuals and a corporation charged with a crime, and therefore subject to loss of liberty and property, demands that the jurisdictional foundation

for the offenses alleged be given close scrutiny. Cf. United States v. Yoshida Intern, Inc., supra, at 580.

The Tenth Circuit in Bishop made it clear that reliance on past Presidential proclamations of a national emergency to support a present pronouncement of an emergency, that in turn is employed as the basis for a criminal prosecution, violates a defendant's due process rights under the Fifth Amendment. This deprivation of constitutional rights inures not only because the defendant is not given fair notice that specific conduct is forbidden by virtue of the passage of time and the obvious absence of any real emergency, as in Bishop (555 F.2d at 777), but also because the imposition of criminal sanctions in the case at bar is not reasonably related to the authority granted by Congress, See, Real v. Simon (5th Cir.

1957) 510 F.2d 557, 564.[18]

Failure to reverse the convictions of all the instant defendants on Counts Ten through Fourteen and of the corporation and Frances Spawr on Counts Three through Six gives the Executive Branch tacit judicial approval to utilize §5(b) of the TWEA regulating foreign commerce in virtually any manner and to compel Congress to continue to sanction rules and regulations it has chosen to abandon or refused to adopt. As the Yoshida court made clear, the Executive is not to receive:

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18) It is important to note that the government did not prosecute this case on the basis that the alleged exportation of copper watercooled laser mirrors to the Soviet Union posed a danger to the national defense. (See, e.g., (T. 2422-2423).

> "judicial approval of a wholesale delegation of legislative power. Nor do we find in §5(b) the grant of the 'unrestrained and unbridled' authority feared by the Customs Court. The Courts continue to sit and remain prepared, as was the court in Real . . . to impede an unreasonable or ultra vires exercise of the power granted in §5(b). We do not here sanction the exercise of unlimited power, which . . . would be to strike a blow to our constitution".

526 F.2d at 583.

B. The Court of Appeals Failure to Review the Jurisdictional Propriety of Petitioners Convictions Raises Important and Novel Questions of Federal Dimension

In their reply brief, at oral argument and subsequently in letter briefs dated April 23, 1982 and May 18, 1982 Petitioners raised an issue as to the jurisdictional invalidity of their convictions. The Court of Appeals declined to consider this issue under its alleged discretionary authority to refuse to do so, 685 F.2d at 1078 n. 2.[19]

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19) The court apparently felt that the issue was belatedly raised. However, jurisdiction is an issue which goes to the very heart of a prosecution. It cannot be waived but instead may be raised at any time. United States v. Shaw (9th Cir. 1981) 655 F.2d 168, 171; United States v. Heath (9th Cir. 1974) 509 F.2d 16, 19; See also United States ex rel. Condon v. Ericksen (8th Cir. 1972) 459 F.2d 663, 666-67. Federal Rule of Criminal Procedure 12(b)(2) specifically excludes jurisdiction as an issue waived by failure to raise it prior to trial.

Subsequently, petitioners raised this issue in their petition for a rehearing en banc and supplemental brief. This resulted in a modification of note 2 to indicate that 1 U.S.C. §109 avoided the jurisdiction issue. It has consistently been petitioners' contention that said statute is inapplicable to the instant prosecution and that a hearing in the issue of jurisdiction is essential to preservation of their right to due process in appellate review.

Petitioners in the instant case were charged with having failed to obtain validated export licenses for shipments of laser mirrors, such licenses alledgedly being required under certain regulations originally promulgated by the Department of Commerce pursuant to the Export Administration Act of 1969 (EAA 1969) (50 U.S.C. App. 2403, et. seq.) P.L. 91-184; 83 Stat. 841, December 30, 1969. Under §14 of the EAA of 1969, the Act was to terminate on June 30, 1971. However, a series

of legislative amendments kept the EAA of 1969 viable through September 30, 1976.[20] The EAA of 1969 was revitalized on June 22, 1977 and expired again on September 30, 1979. On September 30, 1979 the EAA of 1979 became effective, P.L. 96-72, 93 Stat. 535. The EAA of 1979 superceded entirely the EAA of 1969.

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20) Three short term lapses, prior to 1976 were "remedied" by three Executive Orders substantially similar to the Order at issue in the instant case. See Ex. Or. No. 11677 of 1972 (revoked by Ex. Or. No. 11683; covering 28 day lapse); Ex. Or. No. 11796 of 1974 (revoked by Ex. Or. No. 11798; covering 14 day lapse); and Ex. Or. No. 11810 (revoked by Ex. Or. No. 11818; covering 29 day lapse). As noted in Youngstown Sheet & Tube Co. v Sawyer (1952)343 U. S. 579, however, where other Presidents without congressional authority have taken similar action, "Congress has not thereby lost exclusive authority to make laws necessary and proper to carry out the power visited by the Constitution 'in the Government of the United States or in any Department or Office thereof.' " See also AFL-CIO v. Kahn (D.C. Cir. 1980) 618 F.2d 784, 819 (Robb, J., Dissenting).

The EAA of 1979 contains a savings provision for prior administrative proceedings, 50 U.S.C. App. 2420(b). However, no savings provision is contained within the Act for criminal prosecution. As such, it is clear that the intent of Congress was to apply the EAA of 1979 to prosecutions commenced after its effective date and that prosecutions under the EAA of 1969 would be abated. As such the prosecution herein was clearly jurisdictionally defective See Bell v. Maryland (1964) 378 U.S. 226, 12 L.Ed.2d 826, 824 S. Ct. 1814; United States v. Chambers (1934) 291 U.S. 217, 78 L.Ed. 763, 54 S. Ct. 434.

The general savings clause in 1 U.S.C. §109 is herein inapplicable since the statute itself (EAA of 1979) contains a savings clause. Thus the statutory construction principle that the specific statute will govern the general one must be applied. The conclusion then evident is that since the EAA

of 1979 was in effect when Petitioners were tried they could be prosecuted only upon the basis of that act and regulations issued thereunder.

Prior to the time of Petitioners' Indictment the Export Administration Regulations were amended requiring a special license to export laser systems only where such systems exceed 2500 watts of output. (A copy of said amendment is attached hereto as Appendix [C-1]). However, Petitioners were tried under the superceded regulation requiring a license where systems exceeded 1200 watts of output and the jury was so instructed. This is particularly significant since a defense expert testified that the systems involved were designed for 1200 watts output (T. 1245-1246).

The General Savings Statute of 1 U.S.C. §109 is likewise inapplicable to the instant case as it is not applied to procedural changes. Warden v. Marrero (1974)

417 U.S. 653, 661, 41 L.Ed.2d 383, 391, 94 S. Ct. 2532, 2537; United States v. Blue Sea Line (5th Cir. 1977) 553 F.2d 445; United States v. Mechem (10th Cir. 1975) 509 F.2d 1193. Here the change is clearly one of regulatory procedure, i.e., the license application process does not apply to devices with less than 2500 watts of output. Thus, the superceding regulations should have been applied.

Petitioners' convictions are jurisdictionally defective for a second reason: there was no statutory predicate for the proscription of the acts alleged. Petitioners' alleged illegal acts occurred between September 30, 1976 and June 22, 1977. However, during that time the EAA had lapsed.

Consequently no regulations existed proscribing the conduct upon which their convictions were based.[21]

Finally, revisions of the Trading With The Enemies Act (TWEA) (50 U.S.C. 5) likewise demonstrate that Petitioners' convictions are jurisdictionally defective. In 1977 §5(b) of the TWEA was amended to eliminate the President's broad powers of control during times of national emergencies, P.L. 95-223, 91 Stat. 1625. Thus the President was left with broad powers to regulate only during times of war. Consequently the 1980 prosecution of Petitioners could not be based upon an Executive Order previously issued purporting to create controls during

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21) Executive Order 11940 was issued upon the expiration of the EAA purporting to extend the effect of the regulations thereunder. See Supra regarding the constitutional validity of this procedure.

the time of a National Emergency. The savings provision of this act extended such powers only through 1978, P.L. 95-223, Title 1 §101(b). Subsequent Executive action provided for an additional one year extension, 43 Fed. Reg. 40449. However, by 1980 the authority had lapsed and thus regulations thereunder could not serve as the basis for a criminal prosecution. Further, the 1977 amendments to the TWEA eliminated the criminal penalties for violations of regulations under 5(b). Thus evidencing the Congressional intent to eliminate criminal proceedings.

The General Savings Clause of 1 U.S.C. §109 is likewise inapplicable to the regulations issued under the TWEA. It is clear that the changes made in the TWEA are procedural in nature. The Congressional intent was clearly to change the procedure for establishing regulations (i.e., delete that power from the President's authority) and thus as argued supra 1 U.S.C. §109 did not

apply. The elimination of criminal penalties shows a procedural shift to civil enforcement under the statute; clearly the entire procedure of regulation was changed. See Blue Sea Line, supra, 553 F.2d at 450. Moreover, the act itself contained a savings clause and thus its specific savings clause must be held applicable.

The instant issue is one of extreme significance since it concerns both the powers of the President and those of Congress as well as the authority to pursue criminal prosecutions under superceded statutes and regulations. Moreover, this appears to be a novel issue since this court has not yet spoken upon the propriety of prosecuting individuals after the EAA regulations herein had been superceded. As a consequence it is respectfully suggested that this court should grant certiorari to settle this issue.

C. The Conduct of the Prosecution in Petitioners' Trial Raises Significant Issues as to the Denial of Due Process

Petitioners urged the court below to dismiss the Indictment or grant a new trial based on the government's several acts of misconduct throughout the case. The Court of Appeals found no significant misconduct. However, a review of the record raises significant due process questions.

The record below is uncontroverted that that potentially excupatory documents were given to government agents and not returned. This would seem in contravention of the prosecution's duty to provide the defense with material evidence. See generally Brady v. Maryland (1963) 373 U.S.83. Suppression of this evidence requires relief irrespective of the prosecution's good faith. United States v. Agurs (1976) 427 U.S. 97, 106.

Secondly, petitioners were denied their rights to compulsory process and confrontation. Attorney Michael J. Cifrino consult-

ed with one of the defense witnesses. Thereafter defense counsel asked that he remain. However he left the courtroom denying petitioners of their rights to examine her. See generally Parker v. Gladden (1966) 385 U.S. 363; Paoniv v. United States (3rd Cir. 1922) 281 F.801.

Finally, the U.S. Attorney prosecuting the case granted an interview to NBC which was broadcast during the trial. During the program, entitled "Soviet Spies", the U.S. Attorney stated that individuals spotlighted during the broadcast as export violates were guilty. Thereafter petitioners were shown leaving the courthouse. While the U.S. Attorney's comments were not aimed directly at petitioners, the juxtaposition of the comments and the pictures were clearly prejudicial. The mere granting of the interview was a irresponsible act as it could have no other effect then to create a prejudicial climate. See generally Berger

v. United States (1935) 295 U.S. 78, 88. See also Irwin v. Dowd (1961) 366 U.S. 717; Sheppard v. Maxwell (1966) 384 U.S. 333.

D. A Hearing In This Case Is Necessary to Resolve the Conflict Among the Circuit Courts as to the Standard of Proof Necessary for Admission of Co-Conspirators Statements

It is fundamental that the hearsay declarations of co-conspirators are inadmissible unless the government establishes that:

> "(a) The declaration was in furtherance of the conspiracy;
> (b) It was made during the pendency of the conspiracy; and
> (c) There is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant to it."

United States v. Snow (9th Cir. 1975), 521 F.2d 730, 733, cert. denied (1976), 423 U.S. 883, citing, Carbo v. United States (9th Cir. 314 F.2d 718, 735 n. 21, cert. denied (1964), 377 U.S. 953. Relying on United States v. Ellsworth (9th Cir.), 481 F.2d 864, 871, cert. denied (1973), 414 U.S. 104. See also,

United States v. Nixon, (1974) 418 U.S. 683, 701 n. 14.

In the case at bar, following the government's offer of proof concerning the existence of a conspiracy, the trial court determined that the out-of-court declarations of the individual co-conspirators were admissible against the other co-conspirators. However, the "independent evidence" so offered consisted of additional declarations of the co-conspirators, no acts were proffered to establish the existence of the conspiracy. The circuit courts are divided as to the propriety of this incongruous result. Compare United States v. Martorano, 557 F.2d 1, 11-12, cert. den. (1978) 435 U.S. 922 with United States v. Bell (8th Cir. 1978) 573 F.2d 1040, 1044. Clearly, the admission of such statements was prejudicial to petitioners. See United States v. Di Rodio (9th Cir. 1977) 565 F.2d, 573, citing, United States v. Eaglin (9th Cir. 1977).

E. The Instant Case Raises Significant Issues as to the Quantum of Proof Necessary for Conviction.

In United States v. Anderson (9th Cir.), 532 F.2d 1218, 1223, cert. den. (1976) 429 U.S. 839, the Court stated:

> "The test to be applied by the trial court in deciding a motion for judgment of acquittal in a criminal case and the test to be applied by the appellate court in reviewing that decision are, as a practical matter, identical. The evidence must be considered in the light most favorable to the verdict. United States v. Nelson (9th Cir. 1969), 419 F.2d 1237. The court must be "satsified that the jurors reasonably could decide that they would not hesitate to act in their own serious affairs upon factual assumptions as probable as the conclusion" that the defendant is guilty as charged. United States v. Leah (9th Cir. 1975), 590 F.2d 122, 125; United States v. Felix (9th Cir. 1973), 474 F.2d 610, 612; United States v. Nelson (9th Cir. (1969), 419 F.2d 1237, 1245."

It is respectfully submitted that the government failed, in the case at bar, to prove beyond a reasonable doubt the guilt of each of the Petitioners on Count Ten and Eleven through Fourteen, of Frances Spawr

on Counts One through Six, and the corporation on Counts One through Nine. Said convictions must therefore be reversed.

As to Count 10, the conspiracy was alleged to have occurred between October 1976 and July 1977, the only proof presented predated the October 1976 time period. This created unfair surprise which should have resulted in dismissal. See generally, United States v. Anderson, supra, 532 F.2d at 1227. Moreover the evidence was insufficient to sustain the Count. See Jeffers v. United States (9th Cir. 1968) 382 F.2d 749, 753; Danielson v. United States (9th Cir. 1968) 321 F.2d 441, 444. See also United States v. Wieschenberg (5th Cir. 1979) 604 F.2d 326.

The evidence was likewise insufficient as to Counts 7-9 and 11-14. No evidence of use or benefit was introduced at trial nor did the court instruct as to these cortical elements. Moreover the evidence as to design was insufficient to demonstrate that

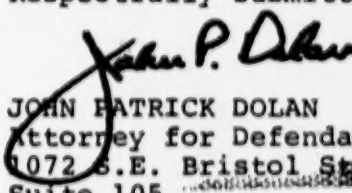
the mirrors involved did not fall within the licensing exemptions. Moreover the fact that only the corporation was convicted on these counts suggests the evidence was inadequate.

The testimony as to Counts 1-6 from the corporation's comptroller indicated that the values represented were accurate in terms of the cost of production of the mirrors. The court refused to instruct as to the meaning of value. But the cost of production is not inconsistent with constructions of value. See United States v. Douglas Aircraft Co. (C.C.P.A. 1975) 510 F2d. 1387, 1391. At worst the statements filed were non-responsive. Thus to have convicted on these counts inevitably required improper jury speculation. See Bransten v. United States (1973) 409 U.S. 352, 359. Consequently clearly the evidence was insufficient to convict on these counts.

CONCLUSION

Based upon the facts of this case and the foregoing arguments and authorities, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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[Appendices Follow]

APPENDIX A

Opinion of the Ninth Circuit Court of Appeals

United States v. Spawr Optical Research, Inc. (9th Cir. 1982) 685 F.2d 1076

United States Court of Appeals,
Ninth Circuit.

Case No. 81-1078.

United States of America,
Plaintiff-Appellee,

v.

Spawr Optical Research, Inc., a corporation, Walter J. Spawr and Frances A. Spawr, individuals,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California.

Argued and Submitted Nov. 3, 1981.
Decided Aug. 24, 1982.

Before Choy and Nelson, Circuit Judges, and Ingram*, District Judge.

CHOY, Circuit Judge:

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* The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

Walter and Frances Spawr and their family-owned corporation, Spawr Optical Research, Inc. (the Spawrs), appeal their convictions resulting from their unlicensed export of laser mirrors destined for the Soviet Union.[1] Their principal challenge is

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[1]A federal grand jury indicted the Spawrs and the corporation for misrepresenting shipment values in Shipper's Export Declarations submitted to the U.S. Customs Service, a violation of 18 U.S.C. § 1001 (1976) (Counts 1-6); conspiracy to export without a license, a violation of 18 U.S.C. §371(1976) (Count 10); and exporting laser mirrors to Germany and Switzerland with the knowledge that the mirrors would be shipped to the Soviet Union, a violation of export administration regulations as authorized by the Export Administration Act of 1969, Pub.L.No.91-184, 83 Stat. 841 (1969) (current version at 50 U.S.C. app. §§2401 et seq. (Supp. III 1979)) (Counts 7-9), by the Trading with the Enemy Act, 50 U.S.C. app. §5(b) (1976) (current version at 50 U.S.C. app. §5(b) (Supp. III 1979)), and by Executive Order No. 11940, 3 C.F.R. 150 (1976 compilation), reprinted at 50 U.S.C. app. §2403 (1976) (Counts 11-14).

After a 13-day trial, the jury found the corporation guilty on all of the charges (Counts 1-14), convicted Frances and Walter on both the conspiracy and substantive exporting charges as to the second Russian order (Counts 10-14), and convicted Frances on the false representation charges (Counts 1-6). The court denied the Spawrs' motions for acquittal and for a new trial, sentenced the

to the Government's reliance on allegedly defunct export regulations that they were convicted of violating. They also allege that government misconduct prejudiced their defense, that the trial court erred by admitting co-conspirators' statements that lacked a proper evidentiary base, and that, in any event, the evidence was insufficient to support the convictions.[2] We find all of these contentions unpersuasive.

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corporation to pay fines totaling $100,000, and placed Walter and Frances on probation for five years under various terms and conditions, including required community service, with the stipulation that Walter serve the first six months of his sentence in a jail-type institution.

[2]The Spawrs raise additional challenges to their convictions for the first time in their reply brief and in subsequent letters to this court. As a general rule, we will not consider an issue raised for the first time in a reply brief. McCall v. Andrus, 628 F.2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996, 101 S.Ct. 1700, 68 L.Ed.2d 197 (1981). The same is true of a post-hearing letter. Appellants offer no reason why their challenges should escape the general rule. Therefore, they are foreclosed from raising the issues here.

I. BACKGROUND

In 1969, Frances and Walter Spawr formed Spawr Optical Research, Inc., as a means of exploiting Walter's skills as an optics expert. Walter served as president, Frances as secretary-treasurer, and together with a third individual they constituted the corporation's board of directors. While operating out of the Spawr home, Walter invented a superior process for polishing laser optics and mirrors. By 1975, the Spawrs were in commercial operation and had developed a client list that included universities, industrial users of lasers, defense subcontractors, and government defense agencies.

As the Spawrs began to explore international markets in 1974, they established a business arrangement with Wolfgan Weber, a West German national, calling for Weber to promote and distribute Spawr mirrors in

Central and Eastern Europe, including the Communist Block nations. Weber, who was named an unindicted co-conspirator with the Spawrs, arranged and facilitated the two orders of laser mirrors which underlie the Spawrs' convictions.

In October 1975, Spawr provided Weber with sample laser mirrors to exhibit at a trade show in Moscow. The laser mirrors attracted considerable interest and in January 1976 Weber obtained the Spawrs' authorization to accept an order for mirrors from a purchasing agency of the Soviet Government. When Weber visited California in late spring of 1976, the Spawrs provided him with some of the mirrors for the order. In July, the Spawrs shipped the balance of the order to Weber in West Germany. Weber then forwarded the entire order to Moscow. In the shipping documents accompanying the mirrors,

Frances listed the value of each mirror at $500. The Spawrs never attempted to obtain a validated export license for the mirrors exported for this first order.

In April 1976, Weber notified Spawr that he had received a second Soviet order for Spawr mirrors. Walter told Weber that he thought it might be better to ask for an export license for at least part of this order. Weber then provided Walter with an end-user statement. On May 4, 1976, Walter filed an application with the Commerce Department for a validated export license for some of the mirrors by the Soviets. The Commerce Department denied the application on October 7, 1976 pursuant to Executive Order 11940 and existing export regulations, because the mirrors were found to have "significant strategic applications" posing a potential threat to national

security. Weber sent a letter cancelling the second Soviet order on November 3, 1976 after Spawr informed him that the application had been denied. In February 1977, however, Spawr shipped mirrors to a freight forwarder in Switzerland. Weber then relabeled the boxes containing the mirrors and shipped them to Moscow. The shipping documents accompanying the mirrors again stated that the value of each mirror did not exceed $500.

II. THE VALIDITY OF THE EXPORT REGULATIONS

In light of the pending expiration of the Export Administration Act of 1969 (EAA)[3], President Gerald Ford issued

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[3]Pub.L.No.91-184, 83 Stat. 841 (1969) (current version at 50 U.S.C. app. §§2401 et seq. (Supp. III 1979)).

Executive Order No. 11940[4] on September 30, 1976 to maintain the EAA regulations forbidding the shipment of specified strategic items to certain foreign countries. He acted pursuant to §5(b) of the Trading with the Enemy Act (TWEA), 50 U.S.C. app. §§ 1-44. When the Order was issued and while it remained in effect, the TWEA empowered the President, during a presidentially-declared national emergency, to "regulate,...prevent or prohibit...any exportation of...or transactions involving any property in which a foreign country...has any interest." Id. at §5(b)(1)(B).[5]

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[4] 3 C.F.R. 150 (1976 compilation), reprinted in 50 U.S.C. app. §2403(1976).

[5] Section 5(b) was later amended to eliminate all reference to "national emergency." See Act of Dec. 28, 1977, Pub.L.No.95-223, §§101(a), 102, 103(b), 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. app. §5(b) (Supp. III 1979).

Rather than declare a new national emergency to support the Executive Order, President Ford relied on the continued existence of national emergencies declared in 1950 by President Truman relating to the Korean War and in 1971 by President Nixon concerning an international monetary crisis. See Exec. Order No. 11940, 3 C.F.R. 150 (1976 compilation), reprinted in 50 U.S.C. app. §2403 (1976).

The laser mirrors for the first Russian order were exported before the EAA expired on October 1, 1976, and the Spawrs do not dispute the Government's authority to prosecute them for exporting mirrors to fill the first Soviet order. The Spawrs exported laser mirrors for the second Soviet Order, however, after the EAA had expired and before it was reenacted on

June 22, 1977,[6] when the sole basis for the regulations was the Executive Order. The Spawrs assert that the Order did not preserve the export regulations and, therefore, the Government lacked authority to prosecute them for their exporting mirrors for the second Soviet orders because: (1) there was no genuine national emergency, (2) the regulations were not rationally related to any emergency then in existence, and (3) the lapse of the EAA shows that Congress

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[6] See Export Administration Amendments of 1977, Pub.L.No.95-52, 91 Stat. 235(1977) (current version at 50 U.S.C. §§2401 et seq. (Supp. III 1979). On July 7, 1977, the September 1976 Order was revoked by Executive Order No. 12002, 3 C.F.R. 133 (1977 compilation), reprinted in 50 U.S.C. app. §2403 (Supp. I 1977).

intended to terminate the regulations.[7]

[1] Former section 5(b) of the TWEA delegated to the President broad and extensive powers; "it could not have been otherwise if the President were to have, within constitutional boundaries, the flexibility required to meet problems surrounding a national emergency with the success desired by

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[7] The Spawrs also argue that they were denied due process because they did not have fair notice that the specific conduct was forbidden. See United States v. Bishop, 555 F.2d 771,777 (10th Cir. 1977). The Spawrs, however, had actual notice of the proscribed conduct. Walter Spawr had been in contact with the Department of Commerce throughout the summer of 1976 when the license application was pending and was told not to ship the mirrors without a license. Frances Spawr was obviously aware of the regulations because she directed an employee to undervalue the mirrors specifically to avoid the required license. The applicable export regulations reissued under Executive Order No. 11940 were identical to those pursuant to which the defendants submitted their application. Under these circumstances, a person of ordinary intelligence would have been given fair notice that the contemplated conduct was forbidden. Id.

Congress." United States v. Yoshida International, Inc., 526 F.2d 560, 573 (Cust. & Pat. App. 1975)(footnote omitted). Wary of impairing the flexibility necessary to such a broad delegation, courts have not normally reviewed "the essentially political questions surrounding the declaration or continuance of a national emergency" under former §5(b). Id. at 579.[8] The statute contained no

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[8]Since the 1975 decision of the Court of Custom and Patent Appeals in Yoshida, Congress has eliminated all references to a national emergency in §5(b), see supra note 5, and has established procedures for declaring and terminating a national emergency. See The National Emergencies Act, Pub. L.94-412, 90 Stat. 1255 (1976), codified at 50 U.S.C. §1601-41 (1976). We need not decide how these changes might affect the reviewability of the above issues.

standards by which to determine whether a national emergency existed or continued; in fact, Congress had delegated to the President the authority to define all of the terms in that subsection of the TWEA including "national emergency," as long as the definitions were consistent with the purposes of the TWEA. 50 U.S.C. app. §5(b)(3). In the absence of a compelling reason to address the difficult questions concerning the declaration and duration of a national emergency under former

§5(b), we decline to do so.[9]

[2] Although we will not address these essentially-political questions, we are free to review whether the actions taken pursuant to a national emergency comport with the power delegated by Congress.

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[9]A decision to review the duration of a national emergencies involved here, however, would probably not help the Spawrs. This court has previously commented that the national emergencies relied on in this case were terminated effective September 14, 1978 only by operation of the National Emergencies Act of 1976, 50 U.S.C. §1601. Cornet Stores v. Morton, 632 F.2d 96, 97 (9th Cir. 1980), cert. denied, 451 U.S. 937, 101 S.Ct. 2016, 68 L.Ed.2d 324 (1981). The legislative history of the Act of Dec. 28, 1977, see supra note 5, also indicates that Congress believed that these national emergencies remained in effect until the enactment of the National Emergencies Act. See S.Rep. No. 466, 95th Congress, 1st Sess. 2, reprinted in 1977 U.S.Code Cong. & Ad.News 4540,4541. Moreover, the National Emergencies Act plainly states that the termination of the emergencies would not affect any actions taken or penalties incurred prior to the 1978 expiration date. 50 U.S.C. §1601(a)(2),(3)

See Yoshida, 526 F.2d at 579.[10] The standard proffered by the Spawrs is that the President's action must be rationally related to the national emergencies invoked. Assuming, without deciding, that the Spawrs are correct, we believe that there is a rational relationship.

One source invoked by President Ford was Presidential Proclamation No. 2914. It declared a national emergency based in part on events which "imperil the efforts of this

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[10] As noted previously, the express delegation in §5(b) to the President was broad and enabled him to regulate, prevent or prohibit the exportation of any property to any foreign country. The unambiguous wording of the statue clearly shows that the President's actions were in accordance with the power Congress delegated. Cf. United States v. Yoshida International, Inc., 526 F.2d 560, 573 (Cust. & Pat. App. 1975) (that President can regulate imports is incontestable under language of §5(b)).

country and those of the United Nations to prevent aggression and armed conflict." 3 C.F.R. 99, 100 (1949-53 compilation). President Ford's effort to limit the exportation of strategic items clearly had a rational relationship to the prevention of aggression and armed conflict.

[3] The Spawrs' final argument, that Congress intended to terminate these export regulations by allowing the EAA to lapse, is rebutted by presidential and congressional actions taken concerning the EAA. The EAA had previously lapsed three times. In each instance, the President used an executive order virtually identical to Executive Order No. 11940 to

maintain the export regulations.[11] All three orders relied upon the same unrevoked declarations of national emergencies and upon §5(b) of the TWEA.

Congress not only tolerated this practice, it expressed approval of the President's reliance on the TWEA to maintain the export regulations. In passing the 1977 amendments to the EAA, Congress again conferred on the President the rule-making authority necessary to main-

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[11] See Exec. Order No. 11810, 3 C.F.R. 905 (1971-75 compilation) (covering 29-day lapse; revoked by Exec. Order No. 11818, 3 C.F.R. 924 (1971-75 compilation)); Exec. Order No. 11796, 3 C.F.R. 888 (1971-75 compilation) (covering 14-day lapse; revoked by Exec. Order No. 11798, 3 C.F.R. 890 (1971-75 compilation)); Exec. Order No. 11677, 3 C.F.R. 719 (1971-75 compilation) (covering 28-day lapse; revoked by Exec. Order 11683, 3 C.F.R. 724 (1971-75 compilation)).

tain the regulations. The legislative history of the 1977 amendments indicates that the reenactment of §5(b) "reflected concern for preserving existing regulation imposed under emergency authority, including ...the transaction control regulations, which prohibit U.S. persons from participating in shipping strategic goods to...the Soviet Union." S.Rep.No. 466, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. Code Cong. & Ad.News 4540, 4542.[12]

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[12]See also Emergency Controls on International Economic Transactions: Hearings on H.R. 1560 and H.R. 2382 Before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 95th Congress, 1st Sess. 30(1977). During one hearing concerning the presidential use of the TWEA, Congressman Bingham observed: "One of the reasons why the Export Administration Act has been allowed to expire so many times is because there was [the TWEA]...." Id. at 136.

Moreover, the EAA apparently was allowed to lapse only because Congress could not resolve questions relating to the anti-boycott provisions. See Arab Boycott Hearings on S. 69 and S. 92, Before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban Affairs, 95th Congress, 1st Sess. 1 (Senator Stevenson)(1977). The Spawrs have offered no evidence that Congress intended to dismantle the export controls.

In conclusion, even under the demanding scrutiny the Spawrs argue is appropriate because of the criminal nature of this case, it is unmistakable that Congress intended to permit the President to use the

TWEA to employ the same regulatory tools during a national emergency as it had employed under the EAA. We, therefore, conclude that the President had the authority during the nine-month lapse in the EAA to maintain the export regulations.

III. ALLEGED MISCONDUCT

The Spawrs also argue that the district court denied them a fair trial by not granting their motions to dismiss the indictments or to order a new trial because of prosecutorial misconduct. The Spawrs allege three instances of misconduct: a failure to return subpoenaed documents, an impermissible interference with a defense witness, and a televised interview with the prosecutor.

[4] If sufficiently severe, pro-

secutorial misconduct may justify either remedy sought by the Spawrs. See United States v. Samango, 607 F.2d 877, 884-85 (9th Cir. 1979). In judging the severity of the alleged misconduct, we must determine whether prosecutorial misconduct occurred, whether the issue of misconduct was properly preserved for appeal, and whether the defendants were actually prejudiced by the misconduct. United States v. Berry, 627 F.2d 193, 196-97 (9th Cir. 1980), cert. denied, 449 U.S. 1113, 101 S.Ct. 925, 66 L.Ed.2d 843 (1981).

[5] The Spawrs allege that they submitted some exculpatory documentary evidence pursuant to government subpoenaes, but the Government failed to return it. The Spawrs, however,

have made no factual showing, apart from a self-serving assertion by Walter Spawr in an affidavit supporting a motion to dismiss, that the prosecution refused to disclose documents within its possession. In fact, the record indicates that the Spawrs did not fully comply with the grand jury's subpoenaes. Thus, the first requirement of the Berry test has not been satisfied.

[6] The Spawrs' bare assertions that the conduct of a Department of Defense (DOD) attorney impermissibly interfered with an expert witness and consequently denied them their right to compulsory process or to confront witnesses are without merit. While undergoing cross-examination, a witness for the Spawrs did consult with

the DOD attorney, but he did so on his own initiative. The DOD attorney was not a member of the prosecution team: he attended the trial only to answer possible questions concerning classified information. His contact with the witness did not constitute interference. The DOD attorney did return to Washington, D.C., before completion of the trial, but the Spawrs have not shown how this action denied their right to compulsory process or to confront witnesses.

[7] The Spawrs also failed to prove that they were prejudiced by a national broadcast shown on the first day of the jury deliberations. The broadcast consisted of an interview that had occurred nearly three months earlier in which one of the

prosecutors spoke generally about the Government's investigations into export violations. The prosecutor simply stated his belief that American businessmen had indeed exported high-technology items to the Soviet Union; he did not mention the Spawrs or the laser mirror sales. The network, however, juxtaposed its statements with a film showing the Spawrs leaving the courthouse. The broadcast did not identify the Spawrs.

The prosecutor informed the court of the existence of the interview early in the proceedings. He also notified the court as soon as he learned the time the interview would be aired. Once the trial judge became aware of the news broadcast, he considered all the alternatives

proposed by counsel, including sequestration of the jury, before specifically instructing the jury not to watch any news program on the particular television channel or to talk to anyone who might have. Absent a showing to the contrary, we assume that the jury followed the trial court's instructions. Fineberg v. United States, 393 F.2d 417, 419-20 (9th Cir. 1968)(jury is presumed to have conscientiously observed limiting instruction given by the court).

IV. THE CO-CONSPIRATOR'S STATEMENTS

The Spawrs next contend that the trial should not have admitted the statements of co-conspirators because the

Government failed to establish the existence of a conspiracy. The district court admitted the challenged statements subject to a motion to strike if the Government failed to provide sufficient proof, a procedure we have upheld. See United States v. Kenny, 645 F.2d 1323, 1334 (9th Cir.), cert. denied, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981). The district court later determined that sufficient evidence had been introduced.

> [8] To prove the existence of a conspiracy, the prosecution must establish a prima facie case through the introduction of substantial independent evidence other than the contested hearsay. United States v. Perez, 658 F.2d 654, 658 (9th Cir. 1981). The evidence need not compel finding the existence of a conspiracy

beyond a reasonable doubt, and circumstantial evidence is often sufficient to establish the existence of a conspiracy. Id.

[9] In this case, there is ample evidence independent of the conspirators' statements. The basic actions involved are undisputed. The Spawrs concede that they knew of the Soviet orders, that Walter Spawr signed the export license application relating to the second Soviet order, that Wolfgang Weber sent an end-user statement to Walter Spawr, that after the export license was denied the company continued to manufacture the mirrors to the specifications of the second Soviet order, that Frances Spawr furnished the valuations on the shipper's export declarations

for both orders, that they shipped part of the first order and all of the second order of mirrors to West Germany and Switzerland, and that Weber later shipped the mirrors to Moscow. Weber's testimony on his own role in the conspiracy was not hearsay evidence, and it substantiates the existence of the conspiracy. There was more than sufficient evidence to establish a prima facie case.

V. OTHER ISSUES

[10] We find the Spawrs' other contentions to be without merit. The evidence, when viewed in the light most favorable to the Government, was sufficient to permit any rational trier of fact to find each of the

defendants guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). Inconsistency in the verdicts is not a ground for reversal, United States v. Vixie, 532 F.2d 1277, 1278 (9th Cir. 1976), and is not probative here of the insufficiency of the government's evidence.

[11] Finally, the district court did not err by instructing the jury to equate value of the lasers with the selling price in deciding whether the Spawrs had misrepresented facts in the Shipper's Export Declarations. The export regulations expressly equated value with the

selling price when, as here, the goods were already sold when shipped. 15 C.F.R. §30.7(q)(1)(1976). Moreover, a former Spawr employee testified that Frances intentionally understated the value in order to evade the export restrictions.

The convictions of Walter and Frances Spawr and of Spawr Optical are, therefore, AFFIRMED.

APPENDIX B

Order Denying Petition for Rehearing and Modifying Opinion

United States v. Spawr Optical Research, Inc. (9th Cir. 1982) 685 F.2d 1076

B-2

United States Court of Appeals,
Ninth Circuit.

Case No. 81-1078

ORDER

United States of America,
Plaintiff-Appellee,

v.

Spawr Optical Research, Inc., a corporation, Walter J. Spawr and Frances A. Spawr, individuals,
Defendants-Appellants.

Before: CHOY and NELSON, Circuit Judges, and INGRAM* District Judge.

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*The Honorable William A. Ingram, United States District Judge for the Northern District of California, sitting by designation.

The opinion filed August 24, 1982 is hereby amended as follows. The last two sentences in footnote 2 in the slip opinion at page 3847 should be deleted and replaced by the following:

> Appellants offer no valid reason why their challenges should escape the general rule. We need not address whether abatement is a jurisdictional question that may be raised at any time because, pursuant to the general savings statute, 1 U.S.C. §109, abatement does not apply here. Therefore, the Spawrs are foreclosed from raising the new challenges at this time.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Export Administration Regulations Amendment

United States v. Spawr Optical Research, Inc. (9th Cir. 1982) 685 F.2d 1076

Export Control Commodity Number and Commodity Description	Unit	Validated License Required	GLV $ Value Limit	Processing Code	Reason for Control

Entry No. 1521 (cont.)

(The bandwidth is defined as the band of frequencies over which the power amplification does not drop to less than one-half of its maximum value. The mean frequency is defined as the arithmetic mean between the frequencies at which the power amplification is one-half of its maximum value. For amplifiers designed to operate at frequencies above 1 GHz, see entry No. 1537. For parametric amplifiers, etc., see entry No. 1537; for amplifiers specially designed for and intended to work with oscilloscopes, see entry No. 1584; and

(c) Specially designed parts and accessories therefor.

(Specify by name and model number.)

—1522A Lasers and laser systems (including equipment containing them as follows: ..... | POSTVWYZ | 300 | EE | 1, 4

(a) Lasers and specially designed components and parts therefor, including amplification stages, *except the following when not contained in equipment:*

(i) Argon, krypton and non-tunable dye lasers with both of the following characteristics:

(1) An output wavelength shorter than 0.8 micrometer, and

(2) A pulsed output not exceeding 0.5 Joule per pulse and an average or continuous wave maximum rated single- or multimode output power not exceeding 20 watts;

(ii) Helium-cadmium, nitrogen and multigas lasers not otherwise specified in this item with both of the following characteristics:

(1) An output wavelength shorter than 0.9 micrometer; and

(2) A pulsed output not exceeding 0.5 Joule per pulse and an average or continuous wave maximum rated single- or multimode output power not exceeding 15 watts;

(iii) Helium-neon lasers with an output wavelength shorter than 0.8 micrometer;

(iv) Ruby lasers with both of the following characteristics:

(1) An output wavelength shorter than 0.9 micrometer; and

(2) An energy output not exceeding 20 Joules per pulse;

(v) CO_2, CO or CO_2-CO lasers having either or both of the following characteristics:

(1) An output wavelength in the range of 9 to 11 micrometers, and a pulsed output not exceeding 2.0 Joules per pulse and a maximum rated average single- or multimode output power not exceeding 1,000 watts or a continuous wave maximum rated single- or multimode output power not exceeding 2,500 watts;

(2) An output wavelength in the range of 5 to 7 micrometers and having a continuous wave maximum rated single- or multimode output power not exceeding 50 watts;

(vi) Nd:YAG lasers having an output wavelength of 1.06 micrometers with either of the following characteristics:

(1) A pulsed output not exceeding 0.5 Joule per pulse and a maximum rated average single- or multimode output power not exceeding 10 watts or a continuous wave maximum rated single- or multimode output power not exceeding 50 watts; or

[1] Export lasers and systems to "countries."

Export Control Commodity Number and Commodity Description	Unit	Validated License Required	GLV $ Value Limits TSV	Processing Code	Reason for Control

Entry No. 1521 (cont.)

(The bandwidth is defined as the band of frequencies over which the power amplification does not drop to less than one-half of its maximum value. The mean frequency is defined as the arithmetic mean between the frequencies at which the power amplification is one-half of its maximum value. For amplifiers designed to operate at frequencies above 1 GHz, see entry No. 1537. For parametric amplifiers, etc., see entry No. 1537; for amplifiers specially designed for and intended to work with oscilloscopes, see entry No. 1584; and

(c) Specially designed parts and accessories therefor.

(Specify by name and model number.)

1522A Lasers and laser systems including equipment containing them as follows: [1]..... || PQSTVWYZ || 500 || EE || 1, 4

(a) Lasers and specially designed components and parts therefor, including amplification stages, *except the following when not contained in equipment:*

(i) Argon, krypton and non-tunable dye lasers with both of the following characteristics:

(1) An output wavelength shorter than 0.8 micrometer; and

(2) A pulsed output not exceeding 0.5 Joule per pulse and an average or continuous wave maximum rated single- or multi-mode output power not exceeding 20 watts;

(ii) Helium-cadmium, nitrogen and multigas lasers not otherwise specified in this item with both of the following characteristics:

(1) An output wavelength shorter than 0.8 micrometer; and

(2) A pulsed output not exceeding 0.5 Joule per pulse and an average or continuous wave maximum rated single- or multi-mode output power not exceeding 150 watts;

(iii) Helium-neon lasers with an output wavelength shorter than 0.8 micrometer;

(iv) Ruby-lasers with both of the following characteristics:

(1) An output wavelength shorter than 0.8 micrometer; and

(2) An energy output not exceeding 20 Joules per pulse;

(v) CO_2, CO or CO/CO_2 lasers having either or both of the following characteristics:

(1) An output wavelength in the range of 9 to 11 micrometers, and a pulsed output not exceeding 2.0 Joules per pulse and a maximum rated average single- or multi-mode output power not exceeding 1,500 watts or a continuous wave maximum rated single- or multi-mode output power not exceeding 2,500 watts;

(2) An output wavelength in the range of 5 to 7 micrometers and having a continuous wave maximum rated single- or multi-mode output power not exceeding 50 watts;

(vi) Nd:YAG lasers having an output wavelength of 1.06 micrometers with either of the following characteristics:

(1) A pulsed output not exceeding 0.5 Joule per pulse and a maximum rated average single- or multi-mode output power not exceeding 10 watts or a continuous wave maximum rated single- or multi-mode output power not exceeding 50 watts; or

[1] Export lasers and systems in "number."

APPENDIX D

Certificate of Service by Mail

United States v. Spawr Optical Research, Inc. (9th Cir. 1982) 685 F.2d 1076

CERTIFICATE OF SERVICE BY MAIL

I, John Patrick Dolan, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Petitioners, Spawr Optical Research, Inc., Walter J. Spawr, and Frances A. Spawr, herein, hereby certify that on January 28, 1983, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals on each of the parties herein as follows:

On the Ninth Circuit Court of Appeals herein by depositing such copies in the United States Post Office, Santa Ana, California, with first class postage pre-paid properly addressed to the post office address of the Ninth Circuit Court of Appeals at P.O. Box 547, San Francisco, CA 94101.

On the Honorable William Matthew Byrne, Jr., United States District Court for the

Central District of California herein by depositing such copies in the United States Post Office, Santa Ana, California, with first class postage prepaid, properly addressed to the post office address of the Honorable William Matthew Byrne, Jr., United States District Court for the Central District of California, 312 N. Spring Street, Los Angeles, California 90012.

On the Attorney for Respondent, Theodore Wai Wu, herein by depositing such copies in the United States Post Office, Santa Ana, California, with first class postabe prepaid, properly addressed to the post office address of Theodore Wai Wu, Counsel of Record for Respondent, at United States Attorney's Office, 312 W. Spring Street, Los Angeles, California 90012.

On William Dougherty, herein by depositing such copies in the United States Post Office, Santa Ana, California, with

first class postage prepaid, properly addressed to the post office address of William Dougherty, 17291 Irvine Blvd, Box 960, Ste. 405, Tustin, California 92680.

On Gregory S. Stout, herein, by depositing such copies in the United States Post Office, Santa Ana, California, with first class postage prepaid, properly addressed to the post office address of Gregory S. Stout at 235 Montgomery Street, Ste. 1328, San Francisco, California 94104.

All parties required to be served have been served.

Dated: JAN 28 1983

Respectfully submitted,

Dolan and Sanders

John P. Dolan

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